LINKING STATUTORY FORMS

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I

INTRODUCTION

Business association statutes may be "linked" in the sense that rules from one statute are applied to a business form created under another statute. For example, the Uniform Partnership Act (the "UPA"),[1] the Uniform Limited Partnership Act (the "ULPA"),[2] and the Revised Uniform Limited Partnership Act ("RULPA")[3] provide that general partnership provisions apply to limited partnerships.[4] Although linkage has long been an accepted feature of the law of business associations, it creates confusion about the applicable law. It also may cause application of inappropriate rules to linked business forms. For example, rules that make sense for informal general partnerships with co-equal, personally liable owner-managers may not be appropriate for formally created limited partnerships with passive limited liability owners.[5]

While linkage has created difficulties in limited partnership law, it is now spreading to new standard forms, including the limited liability company (the "LLC") and the limited liability partnership (the "LLP"). Also, linkage threatens to create uncertainties about the extent to which the new general partnership rules in the Revised Uniform Partnership Act ("RUPA")[6] apply to existing limited partnerships.[7] These new developments necessitate a reevaluation of linkage.[8]

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Valuable comments were contributed by Michael Klausner.

1. UNIF. PARTNERSHIP ACT (last amended 1914) [hereinafter UPA], 6 U.L.A. 1 (1969).

2. UNIF. LIMITED PARTNERSHIP ACT (last amended 1916) [hereinafter ULPA], 6 U.L.A. 559 (1969).

3. REVISED UNIF. LIMITED PARTNERSHIP ACT (last amended 1985) [hereinafter RULPA], 6 U.L.A. 447 (Supp. 1995).

4. *See infra* part II.A.

5. For a theoretical overview of the limited partnership form, see Larry E. Ribstein, *An Applied Theory of Limited Partnership*, 37 EMORY L.J. 835 (1988).

6. [REVISED] UNIF. PARTNERSHIP ACT (last amended 1994) [hereinafter RUPA], 6 U.L.A. 280 (Supp. 1995).

7. *See* Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195 (1995) (concluding, as does the present article, that limited partnership law should be delinked from general partnership law); *infra* text accompanying notes 16-17 (discussing application of RUPA to limited partnerships).

8. A Joint Editorial Board of National Conference of Commissioners on Uniform State Laws and the ABA was recently established, the first project of which is to study linkage among the UPA, RULPA, and RUPA. *See* 9 PUBOGRAM 4 (Oct. 1994). Also, a workshop on linkage issues was presented by the Committee on Partnerships and Unincorporated Business Organizations at the Spring 1995 ABA Business Law Section meeting in San Antonio, Texas.

This article evaluates linkage within the framework of a theoretical understanding of the economic role of standard forms. The article initially concludes that RULPA should be revised to delink limited partnerships from general partnerships. In place of linkage, courts would fill gaps in the limited partnership statute by considering the distinct attributes of limited partnerships rather than by drawing from general partnership law. The article then extends this analysis to other applications of linkage in the law of business associations, including formal linkage between close and "standard" corporations, formal linkage between LLPs and standard general partnerships, and the informal linkage created by including general and limited partnership statutory provisions in LLC acts.

Part II of this article discusses the current law and the historical origins of linkage. Part III examines the costs and benefits of linkage, concluding that the benefits of drawing on the statutory language and case law regarding general partnerships are outweighed by the costs of interfering with the functions of separate statutory standard forms. This conclusion supports a general rule of delinkage, emphasizing the need for separate default rules for limited and general partnerships. Part IV works through the details of delinkage by considering how a delinked limited partnership statute should be drafted and how the courts should resolve individual limited partnership issues using a delinked approach. Part V extends the analysis to linkage involving close corporations, LLCs, and LLPs.

II

OVERVIEW OF LIMITED PARTNERSHIP LINKAGE

This part reviews the provisions that link limited partnerships and general partnerships. It then analyzes the effect of those provisions on limited partnership law.

A. The Linkage Provisions

The most important partnership linkage provision is UPA section 6(2), which states:

> [A]ny association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.[9]

Although this provision defines a limited partnership as a *non*partnership, it nevertheless treats a limited partnership as a partnership unless the limited partnership statute is "inconsistent."

9. UPA § 6(2), 6 U.L.A. at 22.

Contrary to the UPA, the ULPA explicitly defines a limited partnership as a "partnership."[10] The ULPA provides that "a general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners," except that a general partner has no power to bind the partnership as to certain acts without the limited partners' consent.[11] The ULPA also permits linkage under a general provision that applies "the rules of law and equity, including the law merchant" to "any case not provided for in this act."[12]

Like the ULPA, RULPA defines a limited partnership as a "partnership"[13] and provides that a general partner has the rights, powers, restrictions, and liabilities of a partner in a partnership with no limited partners.[14] It also makes a more explicit linkage than the ULPA by providing that "[i]n any case not provided for in this [Act], the provisions of the [UPA] govern."[15] RULPA linkage language is broader than the UPA's to the extent that it permits application of the UPA whenever there is no analogous RULPA provision. The UPA linkage language might preclude application of the UPA if RULPA's silence on an issue is interpreted as a negative pregnant and therefore "inconsistent" with the UPA.

RUPA does not explicitly provide for linkage and defines "partnership" so as to exclude limited partnerships.[16] However, the linkage language in RULPA arguably controls even after a state adopts RUPA.[17] Also, RUPA creates a link with limited partnership law that did not previously exist by providing for mergers and conversions of limited and general partnerships.[18]

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10. ULPA § 1, 6 U.L.A. at 562.

11. *Id.* § 9, 6 U.L.A. at 586-87; *see also id.* § 12(2), 6 U.L.A. at 596-97 (directing that one who is both a general and a limited partner has "all the rights and powers and [is] subject to all the restrictions of a general partner").

12. *Id.* § 29, 6 U.L.A. at 617.

13. RULPA § 101(7), 6 U.L.A. at 449 (Supp. 1995).

14. *Id.* § 403, 6 U.L.A. at 528.

15. *Id.* § 1105, 6 U.L.A. at 610.

16. *See* RUPA § 101(4), 6 U.L.A. at 285 (Supp. 1995) (providing that "partnership" means the entity formed "under Section 202, predecessor law, or comparable law of another jurisdiction"); *id.* § 202(b), 6 U.L.A. at 237 (providing that "[a]n association formed under a statute other than this [Act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership"). These provisions imply that one cannot be a partner solely by virtue of owning an interest in a limited partnership. RUPA does not clarify the issue, as it fails to define "partner."

17. *See* Vestal, *supra* note 7, at 1202-07 (concluding that RULPA should be interpreted as referring to RUPA). There may be some confusion about which general partnership law RULPA refers to after a state adopts a new general partnership law based on RUPA. A few states, including Montana and Wyoming, have enacted versions of RUPA. The Wyoming limited partnership statute explicitly refers to the new partnership law. WYO. STAT. § 17-14-1009(a) (Supp. 1994). However, the Montana Code states more generally that "the provisions of the [UPA] (Title 35, chapter 10) govern." MONT. CODE ANN. § 35-12-503 (1993). The citation is to the location of both the new and revised partnership statutes. Since the limited partnership provision was not changed following the adoption of the new general partnership law, an argument can be made that the limited partnership statute refers to the old, repealed general partnership statute.

18. *See infra* part II.B.10.

B. Effect of Linkage

The linkage provisions discussed above cause much confusion in limited partnership law. Linkage seems clear for limited partnership provisions with no UPA analogues, where limited partnership law clearly applies, and for limited partnership issues with no limited partnership provisions, where general partnership law clearly applies. But questions often arise in determining whether the limited partnership statute actually provides for the case under the RULPA linkage rule or is inconsistent with the UPA under the UPA linkage rule. For example, it is unclear whether the UPA or RUPA applies where a general topic, such as general partners' rights on dissolution or withdrawal, is covered in the limited partnership act but a specific issue, such as rescission for fraud or the profits-or-interest election, is not covered.[19] The question is whether the silence of the limited partnership act should be interpreted as a negative pregnant or as simply not covering the particular issue.[20] The following subsections consider specific examples of linkage confusion.

1. *Formalities of Organization.* The organizational formalities provided for in the ULPA[21] and RULPA[22] have no counterpart in the UPA, because the general partnership traditionally is an informal business association. Thus, limited partnership law clearly applies on these matters.

RUPA, however, creates uncertainty in this respect. Two types of RUPA formalities may apply to limited partnerships—merger and conversion provisions[23] and provisions for filings that notify third parties concerning partners' authority.[24] Although RUPA provides that it does not apply to limited partnerships, the RULPA linkage provision arguably refers to these provisions.[25]

Even if the state's version of RULPA is deemed to link generally with RUPA, RUPA filing provisions do *not* apply under RULPA section 1105 if they deal with cases provided for in RULPA. Although RULPA does not provide

19. *See* UPA § 42, 6 U.L.A. at 521.

20. In answering this question, it may make a difference whether the state has adopted RUPA and repealed the UPA so that only the RULPA linkage provision applies. *See supra* text following note 15 (discussing potentially different meanings of UPA and RULPA linkage provisions).

21. ULPA § 2, 6 U.L.A. at 568.

22. RULPA §§ 201-09, 6 U.L.A. at 472 (Supp. 1995).

23. *See infra* part II.B.10.

24. RUPA §§ 303, 304, 704, 805, 6 U.L.A. at 302, 304, 333, 340 (Supp. 1995) (permitting partnerships to file statements of authority, denial, dissociation, and dissolution).

25. Courts might decide that provisions for extensive formalities are so radically different from the scheme of the UPA that the legislature did not intend to link such provisions with limited partnerships when it passed the state's version of RUPA unless the legislature specifically amended the limited partnership provision to refer to the new partnership provisions, as the Wyoming legislature did. *See supra* note 17. Even under a Montana-type statute, courts could hold that the legislature's failure to change the cross-reference to the general partnership act in the state's version of RULPA indicates an intent to refer to the new statute that is covered by the old cross-reference. *See* MONT. CODE ANN. § 35-12-503 (1993).

for statements of authority, courts nevertheless might decide that RULPA excludes the RUPA provisions concerning formalities because RULPA provides comprehensively for formalities applicable to limited partnerships. The latter approach is supported by a RULPA provision stating that a limited partnership certificate is notice that the partnership is a limited partnership and that persons designated as general partners are such, but that it is not notice of other facts.[26] By explicitly precluding the partnership from binding third parties by notice of authority in the certificate, RULPA appears to occupy the field on this issue and therefore cannot be overridden by RUPA. On the other hand, RULPA does not specifically authorize or prohibit filings of RUPA-type statements of authority. These RUPA provisions could be reconciled with the RULPA provision on certificate notice since the RUPA provisions are better designed than the limited partnership certificate to notify third parties of partner authority.

2. *Partnership Property.* Because neither the ULPA nor RULPA includes provisions on partnership property, the UPA[27] and RUPA[28] provisions on partnership ownership and transfer of property probably apply to limited partnerships.

3. *Provisions Relating to Limited Partners.* The UPA has no provisions on limited partners. Thus, the ULPA and RULPA provisions on admission,[29] voting,[30] information rights,[31] and withdrawal[32] of limited partners apply exclusively. But even provisions that purport to relate only to limited partners can raise linkage questions. ULPA and RULPA provisions on the "control rule"[33] and "erroneous" limited partners[34] relate uncertainly to UPA and RUPA provisions on estoppel and purported-partners.[35] Participating in control and participating as a limited partner without the appropriate certificate—even if the participation falls within a "safe harbor" for control liability[36] or the partner complies with the statutory procedures for erroneous

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26. RULPA § 208, 6 U.L.A. at 499 (Supp. 1995).
27. UPA §§ 8, 10, 6 U.L.A at 115, 155.
28. RUPA §§ 204, 302, 6 U.L.A. at 297, 300 (Supp. 1995). For discussions of differences between the UPA and RUPA on these matters, see 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP §§ 3.02, 4.04, at 3:2, 4:51 (Supp. 1994); Edward S. Merrill, *Partnership Property and Partnership Authority Under the Revised Uniform Partnership Act*, 49 BUS. LAW. 83 (1993).
29. ULPA § 8, 6 U.L.A. at 586; RULPA § 301, 6 U.L.A. at 438 (Supp. 1995).
30. RULPA § 302, 6 U.L.A. at 504 (Supp. 1995).
31. ULPA § 10, 6 U.L.A. at 590; RULPA § 305, 6 U.L.A. at 521 (Supp. 1995). Note that ULPA § 10 provides linkage regarding information rights by giving limited partners the same rights as general partners.
32. ULPA § 16, 6 U.L.A. at 599; RULPA § 603, 6 U.L.A. at 554 (Supp. 1995).
33. ULPA § 7, 6 U.L.A. at 582; RULPA § 303, 6 U.L.A. at 505 (Supp. 1995).
34. ULPA § 11, 6 U.L.A. at 594; RULPA § 304, 6 U.L.A. at 518 (Supp. 1995).
35. UPA § 16, 6 U.L.A. at 195; RUPA § 308, 6 U.L.A. at 308 (Supp. 1995).
36. *See* RULPA § 303(b), 6 U.L.A. at 505 (Supp. 1995) (providing that participation in one or more of listed activities does not constitute taking part in control).

partners[37]—could engender the sort of third-party reliance that creates estoppel or purported-partner liability under the UPA and RUPA. If so, it is not clear whether the general partnership or limited partnership provision applies.[38]

4. *Management and Voting Power of General and Limited Partners.* Under both the ULPA and RULPA, a general partner in a limited partnership has, at least in the absence of contrary agreement, the rights, powers, duties, and liabilities of a general partner in a general partnership.[39] These provisions imply that the UPA rule on per capita allocation of votes and its rules on the number of votes necessary to reach a partner decision[40] apply to general partnerships in the absence of contrary agreement. They also imply that general partners of limited partnerships have the same power to bind the partnership in ordinary matters as do general partners in general partnerships.[41]

Since general partnerships have no limited partners, the limited partnership statute arguably controls the allocation of power between general and limited partners. The RULPA provision that the partnership agreement may grant voting rights to limited partners[42] suggests that the limited partners have no voting rights in the absence of contrary agreement. Yet there are several gaps in limited partnership statutes that general partnership provisions may or may not fill. The ULPA provision that a general partner may not perform *designated* acts without the consent of all of the limited partners[43] raises the question whether the UPA fills the gap by providing for a majority vote of both general and limited partners on *other* matters.[44] Also, the UPA provision that requires *all* partners to consent to self-dealing[45] would apply to limited partnerships in the absence of a fiduciary duty provision in the limited partnership statute. If so, RULPA's definition of "partner," which includes both

37. *See id.* § 304, 6 U.L.A. at 518 (providing that a limited partner who withdraws or causes an appropriate certificate to be filed is not liable to third parties who thereafter transacts business with the partnership).

38. *See id.* § 303(a), 6 U.L.A. at 505 (providing that a limited partner who participates in control is liable only to persons who transact business with the limited partnership "reasonably believing" based on partner's conduct that the partner is a general partner). The RULPA reliance test for control liability further complicates this issue because it is similar but not identical to the reliance required for purported-partner liability. RULPA Section 303(a) appears to require reliance on control activities, while UPA § 16, 6 U.L.A. at 195, and RUPA § 308, 6 U.L.A. at 308 (Supp. 1995), require reliance on any words or conduct by the purported partner or to which she consents. The RULPA test—reliance on control—is either inconsistent with or simply deals with a different issue than the tests in general partnership statutes: reliance on words or conduct generally.

39. *See* ULPA § 9, 6 U.L.A. at 586; RULPA § 403, 6 U.L.A. at 528 (Supp. 1995).

40. *See* UPA §§ 18(e), (g), (h), 6 U.L.A. at 213 (partners have equal votes; majority vote on ordinary matters, unanimity on other matters; unanimity required for admission of partner).

41. *See id.* §§ 9-14, 6 U.L.A. at 132; RUPA §§ 301, 302, 305, 6 U.L.A. at 299, 300, 305 (Supp. 1995); Connecticut Nat. Bank v. Cooper, 656 A.2d 215 (Conn. 1995)(holding that UPA provision that states that a restriction on partner's authority binds third party who knows of it applies to general partners in limited partnership).

42. RULPA § 302, 6 U.L.A. at 504 (Supp. 1995).

43. ULPA § 9, 6 U.L.A. at 586.

44. UPA § 18(h), 6 U.L.A. at 213; RUPA § 401(j), 6 U.L.A. at 310 (Supp. 1995).

45. UPA § 21, 6 U.L.A. at 258.

limited and general partners,[46] would arguably require approval of self-dealing by both general and limited partners.[47] On the other hand, if the UPA applies, it would arguably provide only for a vote by *general* partners.

5. *Transferability.* The ULPA[48] and RULPA[49] include detailed provisions on assignment of partnership interests. Because the ULPA applies only to a limited partner's interest, the UPA applies to transfer of general partners' interests. RULPA withdrawal provisions apply to general partners as well as to limited partners, but they are generally consistent with the UPA in that both provide that a partner's assignment can transfer only financial partner rights.[50]

6. *Partners' Financial Rights and Duties.* Limited partnership statutes include creditor-protection provisions relating to the form of and return of contributions and distributions that are unnecessary in general partnerships. The ULPA provisions apply only to limited partners[51] and therefore do not raise any linkage issues. The RULPA provisions apply both to general partners and to limited partners.[52] These provisions apparently override UPA and RUPA provisions permitting general partners to make capital contributions in any form.[53]

Because the RULPA default rule of sharing by contributions applies both to general and limited partners,[54] RULPA arguably overrides general partnership provisions for equal sharing of profits, losses, and distributions.[55] On the other hand, RULPA also provides that general partners who contribute as limited partners are treated as limited partners to the extent of their participation as such,[56] implying that general partners are subject to rules different than those applicable to limited partners. Indeed, in the absence of contrary agreement, general partners who are personally liable probably would expect to share on a different basis than would limited partners. For these

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46. RUPA § 101(8), 6 U.L.A. at 285 (Supp. 1995).

47. The RULPA definition of "partnership agreement" as "any valid agreement, written or oral, of the partners" implicitly supports the conclusion that an amendment to the partnership agreement requires limited partner consent.

48. ULPA § 19, 6 U.L.A. at 603.

49. RULPA § 702, 6 U.L.A. at 563 (Supp. 1995).

50. *See id.* § 702, 6 U.L.A. at 563 (Supp. 1995); UPA § 27(1), 6 U.L.A. at 353. There is, however, at least one difference between the provisions. RULPA § 702 provides that, "except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all of his [or her] partnership interest," while there is no equivalent provision in the UPA. In case of inconsistency, RULPA, of course, applies. Although the law regarding transferability of limited partnership interests may be clear, borrowing from general partnership law is questionable as a matter of policy, as discussed in more detail below. *See infra* part IV.C.

51. *See* ULPA §§ 15-17, 6 U.L.A. at 174 (compensation of limited partner; withdrawal or reduction of limited partner's contribution; liability for unpaid or returned contributions).

52. *See* RULPA §§ 501-02, 607-08, 6 U.L.A. at 544, 559 (Supp. 1995) (form of contribution; liability for contribution; limitations on distributions; liability on return of contribution).

53. UPA § 18(a), 6 U.L.A. at 213; RUPA § 401(a), 6 U.L.A. at 309 (Supp. 1995).

54. RULPA §§ 503-04, 6 U.L.A. at 549 (Supp. 1995) (profits and losses; sharing of distributions).

55. UPA § 18(a), 6 U.L.A. at 213; RUPA § 401(b), 6 U.L.A. at 309 (Supp. 1995).

56. RULPA § 404, 6 U.L.A. at 542 (Supp. 1995).

reasons, the general partnership statutes may provide the default financial rights for general partners in limited partnerships.

7. *Fiduciary Duties and Remedies.* The ULPA and RULPA do not consider fiduciary duties but do provide that general partners in limited partnerships have the rights, powers, duties, and liabilities of general partners in general partnerships.[57] It seems to follow that UPA and RUPA fiduciary duty provisions[58] govern the fiduciary duties of general partners in limited partnerships.[59] There are, however, no provisions concerning fiduciary duties of limited partners, which are covered neither by general nor limited partnership acts.[60]

With regard to remedies, the ULPA is silent, and RULPA provides for derivative suits.[61] It is not clear whether the UPA accounting remedy[62] applies to limited partnerships, or whether that remedy is a prerequisite to other relief, as is required in general partnerships.[63] RULPA derivative suit provisions strongly suggest that the accounting remedy is not the exclusive remedy available to limited partners, but the impact of the derivative suit provisions on general partner remedies is otherwise unclear. A recent case held that a general partner of a limited partnership could not bring an action at law against another general partner in the partnership's name without first obtaining dissolution and accounting.[64] The court noted that RULPA gives a general partner the same rights in a limited partnership as in a general partnership but did not discuss the possible impact of RULPA derivative suit provisions.

8. *Dissociation of General Partners and Dissolution.* Linkage is perhaps most confusing with regard to dissolution and dissociation of general partners. ULPA and RULPA dissociation and dissolution provisions[65] apparently override the UPA since both explicitly address the issue and are inconsistent with the general partnership statutes. RULPA specifies events of withdrawal[66] and requires written notice of voluntary withdrawal.[67] RULPA also provides that a withdrawing partner is entitled to receive distributions to which she is entitled and, if not otherwise provided in the agreement, the fair value of her

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57. *See supra* note 39 and accompanying text.

58. UPA § 21, 6 U.L.A. at 258; RUPA § 404, 6 U.L.A. at 313 (Supp. 1995).

59. For a comparison of the UPA and the RUPA fiduciary duty provisions, see Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 52-61 (1993).

60. For a discussion of fiduciary duties of limited partners, see *infra* part IV.E.

61. RULPA §§ 1001-04, 6 U.L.A. at 596 (Supp. 1995).

62. UPA § 22, 6 U.L.A. at 529; *see also* RUPA § 405(b), 6 U.L.A. at 316 (Supp. 1995) (partner may maintain action with or without an accounting).

63. *See generally* BROMBERG & RIBSTEIN, *supra* note 28, § 6.08(c), at 6:98.

64. Dulles Corner Properties II Ltd. Partnership v. Smith, 431 S.E.2d 309 (Va. 1993).

65. ULPA §§ 20, 23, 6 U.L.A. at 604, 607 (retirement, death, or insanity of general partner; distribution of assets); RULPA §§ 402, 801-805, 6 U.L.A. at 525, 569 (Supp. 1995) (events of withdrawal of general partner; dissolution, winding up, and distribution of assets).

66. RULPA § 402, 6 U.L.A. at 525 (Supp. 1995).

67. *Id.* § 602, 6 U.L.A. at 553 (Supp. 1995).

interest.[68] These provisions would appear to override analogous RUPA provisions on events of withdrawal[69] as well as UPA[70] and RUPA[71] provisions on distributions to withdrawing partners. However, there may be some question about whether events of withdrawal provided for in RUPA but not in RULPA apply to limited partnerships.[72]

There are also differences between general and limited partnership law regarding the causes of dissolution. Consider the following catalogue of causes.

> UPA causes: (1) termination of the term or undertaking; (2) express will, either with or without violation of the agreement; (3) expulsion; (4) unlawfulness of the business or the members' participation; (5) death of a member; (6) bankruptcy of a partner or the partnership; or (7) judicial decree (a) of a partner's insanity, incapacity, wrongful conduct, or breach, (b) that the business can only be carried on at a loss, (c) that dissolution would be equitable under the circumstances, or (d) upon application of an assignee in a partnership at will.[73]
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> RUPA causes: similar to UPA, except dissociation or express will of a member does not necessarily dissolve the partnership.[74]
>
> ULPA causes: retirement, death or insanity of a general partner.[75]
>
> RULPA causes: (1) at the time specified in the certificate; (2) on an event specified in writing in the partnership agreement; (3) on written consent of all partners; (4) on a partner's event of withdrawal as specified in the statute unless the other members agree to continue; or (5) on judicial decree that it is "not reasonably practicable to carry on the business in conformity with the partnership agreement."[76]

Despite coverage of dissolution and dissociation by the limited partnership statutes, the question remains whether general partnership provisions apply to specific dissolution and dissociation issues that the limited partnership statutes do not cover. For example, the limited partnership acts do not make a partner's express will a cause for dissolution. The RULPA provision on dissolution causes appears to be inclusive, thus excluding UPA causes. But the RULPA provision arguably only specifies dissolution causes that differ between limited and general partnerships. Thus, while a general partner's *withdrawal* is treated differently in limited partnerships than it is in general partnerships (because of

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68. *Id.* § 604, 6 U.L.A. at 556 (Supp. 1995).
69. RUPA § 601, 6 U.L.A. at 322 (Supp. 1995).
70. UPA § 42, 6 U.L.A. at 521.
71. RUPA § 701, 6 U.L.A. at 328 (Supp. 1995).
72. These include the expulsion provisions. *Id.* § 601(4), (5), (7)(iii), 6 U.L.A. at 322.
73. UPA §§ 31-32, 6 U.L.A. at 376.
74. RUPA § 801, 6 U.L.A. at 335 (Supp. 1995).
75. ULPA § 20, 6 U.L.A. at 604.
76. RULPA §§ 801-02, 6 U.L.A. at 569 (Supp. 1995).

the emphasis in the former on continuity), the UPA would still permit a general partner to *dissolve* partnership by express will. The Official Comment to this section, stating that it "merely collects in one place all of the events causing dissolution,"[77] could mean that the section is all-inclusive. Alternatively, the use of the word "merely" taken with the single RULPA dissolution provision, as compared to ULPA dispersion of dissolution provisions in various sections, could mean simply that RUPA collects *limited partnership* causes in one place, while also preserving causes provided for in the general partnership statutes.

Other dissolution causes present similar questions. By applying the UPA[78] where there was no ULPA provision for dissolution upon expiration of a term, one court held that a ULPA limited partnership dissolved on expiration of a twenty-year term.[79] Another court applied the UPA provision permitting judicial dissolution for losses,[80] which is not a ULPA dissolution cause.[81]

There are analogous questions concerning dissolution consequences. While the limited partnership acts provide mainly for distribution rights,[82] the UPA provides in detail for other consequences of dissolution.[83] One court even applied to a limited partnership the UPA provision on continuation of the partnership for purposes of winding up.[84] The few courts that have addressed the issue generally have refused to apply UPA consequences to limited partners. One court refused to apply the UPA provision for a defrauded partner's lien[85] to a limited partner on the ground that the provision is intended to deal only with personally liable general partners.[86] Another refused to apply the UPA post-dissolution profit-sharing provision[87] to a limited partner on the grounds that a limited partner, unlike a general partner, has no exposure to continuing liability and no property interest that is used in continuing the business.[88] It is less clear whether the UPA or RUPA should apply to *general* partners in limited partnerships. Accordingly, the RULPA provision for distributions on

77. *Id.* § 801 cmt., 6 U.L.A. at 569.

78. *See* UPA § 31(1)(a), 6 U.L.A. at 376.

79. Lebanon Trotting Ass'n v. Battista, 306 N.E.2d 769 (Ohio Ct. App. 1972).

80. Cusano v. Cusano, 88 A.2d 342 (N.J. Super. Ct. App. Div.), *cert. denied*, 91 A.2d 228 (N.J. 1952).

81. Note, however, that ULPA § 16(4), 6 U.L.A. at 600 (allowing a limited partner to have the partnership dissolved if he unsuccessfully demands return of his contribution), arguably supplants UPA § 32(1)(e), 6 U.L.A. at 394 (providing for judicial dissolution when the business can only be carried on at a loss).

82. ULPA § 23, 6 U.L.A. at 607; RULPA § 804, 6 U.L.A. at 576 (Supp. 1995); *see also* RULPA § 803, 6 U.L.A. at 574 (Supp. 1995) (winding up).

83. UPA §§ 30, 35-42, 6 U.L.A. at 367, 429 (continuation of partnership for winding up, effect on partners' power to bind; effect on partners' existing liabilities, right to wind up, liquidation of partnership, rights on dissolution for misrepresentation, distribution of assets, liability of persons continuing the business, rights of withdrawn partners as against the continuing partnership).

84. Cheyenne Oil Corp. v. Oil & Gas Ventures, 204 A.2d 743 (Del. 1964).

85. UPA § 39, 6 U.L.A. at 467.

86. Central Allied Profit Sharing Trust v. Bailey, 759 P.2d 849 (Colo. Ct. App. 1988).

87. UPA § 42, 6 U.L.A. at 521.

88. Porter v. Barnhouse, 354 N.W.2d 227 (Iowa 1984). *Contra* Frye v. Manacare Ltd., 431 So.2d 181 (Fla. Dist. Ct. App. 1983).

withdrawal[89] may or may not supersede the UPA provision for profits-or-interest election,[90] which RULPA does not specifically address.

9. *Creditors' Rights.* Under the UPA, general partners have either joint or joint and several liability, depending on the type of obligation.[91] RUPA provides not only for joint and several liability for all debts, but also insists that creditors exhaust remedies against the partnership before levying execution against an individual partner's assets.[92] The UPA and RUPA also provide for a charging order on behalf of creditors of individual partners.[93] The limited partnership acts do not provide for partnership liability, thereby apparently deferring to general partnership law. The ULPA provides for a charging order against limited partners' interests,[94] deferring by implication to the UPA regarding general partners. RULPA provides for a charging order against all partners,[95] apparently precluding application of the UPA as to this remedy.

Other linkage issues with respect to creditors' remedies are less clear. Because there is no equivalent limited partnership provision, the RUPA exhaustion requirement may or may not extend to creditors' efforts to enforce limited partners' obligations regarding returned contributions.[96] The limited partnership charging order remedy, while explicit, is incomplete and therefore invites linkage. Neither the ULPA nor RULPA specifically provides for judicial foreclosure of the charging order and assignment of the interest to the creditor. There is conflicting authority regarding foreclosure on general partnership interests in general partnerships. The UPA implies,[97] and RUPA explicitly provides,[98] that foreclosure is available. But some cases decided under the UPA have denied[99] or limited[100] foreclosure in general partnerships, and one

89. RULPA § 604, 6 U.L.A. at 556 (Supp. 1995).

90. UPA § 42, 6 U.L.A. at 521.

91. *Id.* § 15, 6 U.L.A. at 174. As discussed *infra* in Part V(A) many states' versions of the UPA now include limited liability partnership ("LLP") provisions that modify or eliminate partners' liability. Some of these states also permit limited partnerships to register as limited liability limited partnerships, or LLLPs. *See, e.g.*, DEL. CODE tit. 6 §§ 1553, 17-214. The effect of LLP statutes on limited partnerships in states that do not have LLLP provisions is unclear. LLP provisions are inconsistent with limited partnership statutory provisions that apply to limited partners, and therefore would probably not apply to *limited* partners under RULPA § 1105. But LLP provisions arguably should apply to *general* partners in limited partnerships under provisions that give those partners the same rights as general partners in general partnerships. *See supra* note 39.

92. RUPA § 307(d), 6 U.L.A. at 306 (Supp. 1995).

93. UPA § 28, 6 U.L.A. at 358; RUPA § 504, 6 U.L.A. at 321 (Supp. 1995).

94. ULPA § 22, 6 U.L.A. at 605.

95. RULPA § 703, 6 U.L.A. at 565 (Supp. 1995).

96. At least one case supports direct creditor action against limited partners on this theory. See *In re* Sharps Run Assocs., 157 B.R. 766 (D.N.J. 1993).

97. *See* UPA §§ 28(1)-(2), 6 U.L.A. at 358 (providing for broad judicial powers in connection with charging order; referring to redemption before foreclosure); Beckley v. Speaks, 240 N.Y.S.2d 553 (N.Y. Sup. Ct. 1963) (recognizing judicial sale of interest to third party), *aff'd*, 251 N.Y.S.2d 1015 (N.Y. App. Div.), *app. dismissed*, 202 N.E.2d 906 (N.Y. 1964).

98. RUPA § 504(b), 6 U.L.A. at 321 (Supp. 1995).

99. *See* Buckman v. Goldblatt, 314 N.E.2d 188 (Ohio Ct. App. 1974) (dictum) (stating UPA § 28(2) must refer to foreclosure in support of a judgment against the partnership because otherwise it would

state's version of the UPA prohibits foreclosure.[101] Some cases have restricted foreclosure in limited partnerships as well.[102]

Whether the general partnership rules on foreclosure apply to limited partnerships may depend on linkage of other provisions. The rules prohibiting foreclosure against general partnerships arguably are justified on the ground that a foreclosing creditor, as an assignee, could obtain judicial dissolution and thereby threaten the continuity of the firm.[103] Since the ULPA and RULPA do not explicitly permit assignees to force judicial dissolution,[104] this reasoning arguably does not apply to foreclosure on interests of either general or limited partners in limited partnerships.[105] Thus, the application of general partnership foreclosure rules may turn on whether the assignee's power under the UPA[106] and RUPA[107] to obtain judicial foreclosure is linked to limited partnerships. RULPA includes a specific provision on judicial dissolution that provides only for a partner's right to obtain a decree,[108] implying that RULPA does not apply to this issue, so the UPA would apply. On the other hand, RULPA's silence on assignees' rights in the context of a general provision on

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conflict with UPA § 25(2)(c)).

100. *See* Hellman v. Anderson, 284 Cal. Rptr. 830 (Cal. Ct. App. 1991) (holding that a creditor can foreclose on charged interest without the consent of co-partner unless co-partner satisfies the burden of showing that foreclosure would unduly interfere with business, but noting that UPA permits foreclosure); FDIC v. Birchwood Builders, 573 A.2d 182, 185 (N.J. Sup. Ct. App. Div.) (ordering sale of a partnership interest to a judgment creditor because the debtor partner failed to carry his burden of showing that judgment would be satisfied without sale "in a reasonably expedient manner," and reasoning that the court should be "circumspect" in ordering a sale, the creditor should not have to wait for ultimate development of the property and that partners can avoid sale through redemption), *cert. denied*, 585 A.2d 337 (N.J. 1990); City of New York v. Bencivenga, 169 N.Y.S.2d 515, 519-20 (N.Y. Sup. Ct. 1955) (granting charging order and appointing receiver, but denying authority to sell charged interest without prejudice to a later application "upon a showing of the necessity for such foreclosure").

101. GA. CODE ANN. § 14-8-28 (1994); *see* Larry E. Ribstein, *An Analysis of Georgia's New Partnership Law*, 36 MERCER L. REV. 443, 490 (1985). This prohibition was recently held inapplicable to a limited partnership interest. *See* Nigri v. Lotz, 453 S.E.2d 780 (Ga. Ct. App. 1995).

102. *See In re* Stocks, 110 B.R. 65 (N.D. Fla. 1989) (ruling that judgment creditor not entitled to pursue levy and execution on stock of limited partnership interest where creditor had made no showing whether assets would satisfy judgment in full); Centurion Corp. v. Crocker Nat'l Bank, 255 Cal. Rptr. 794 (Cal. Ct. App. 1989) (ruling that court may authorize sale of judgment debtor's interest in limited partnership where judgment creditor has obtained charging order, judgment remains unsatisfied, and all other parties consent to sale). *But see* Madison Hills Ltd. Partnership II v. Madison Hills, Inc., 644 A.2d 363 (Conn. App. Ct. 1994)(charging creditors' remedies under UPA, including foreclosure, apply to limited liability partnerships); Nigri v. Lotz, 453 S.E.2d 780.

103. *See* BROMBERG & RIBSTEIN, *supra* note 28, § 3.05, at 3:73; J. Gordon Gose, *The Charging Order under the Uniform Partnership Act*, 28 WASH. L. REV. 1, 16 (1953). *But see* J. Dennis Hynes, *The Charging Order: Conflicts Between Partners and Creditors*, 25 PAC. L.J. 1 (1993) (arguing for foreclosure).

104. *See* RULPA § 802, 6 U.L.A. at 573 (Supp. 1995). There is no provision for judicial dissolution in the ULPA.

105. A recent case so held as to foreclosure on a limited partner's interest. *See Nigri*, 453 S.E.2d 780.

106. UPA § 32(2), 6 U.L.A. 394.

107. RUPA § 801(6), 6 U.L.A. at 335 (Supp. 1995).

108. RULPA § 802, 6 U.L.A. at 573 (Supp. 1995).

judicial decrees arguably means that an assignee of a partner in a limited partnership has no right to obtain a decree.[109]

10. *Merger and Conversion.* RUPA provides for conversion of general partnerships into limited partnerships and vice versa,[110] and for mergers of general partnerships with limited partnerships.[111] These provisions suggest that general partnership law controls mergers and conversions involving limited partnerships.[112] This ultimately could link the general partnership statute with the limited partnership statute in certain respects despite specific limited partnership provisions that otherwise would apply.

RUPA requires a general partnership that has converted to a limited partnership to file a certificate that includes certain information about the conversion.[113] Although the applicable limited partnership statute includes specific formation provisions that otherwise would supersede RUPA, a court nevertheless might decide that RUPA applies because RULPA has no merger or conversion provisions. As such, the court might hold that the converted limited partnership was not properly formed even if it complied with the applicable limited partnership statute, unless the parties to the conversion also complied with RUPA conversion provisions.

RUPA provides that a general partner who becomes a limited partner continues to be liable as a general partner for some post-conversion liabilities to third parties who reasonably believe that the limited partner is a general partner.[114] Thus, a limited partner may be liable under RUPA even if she has fully complied with the conditions for limited liability under limited partnership law.

RUPA requires a plan of merger[115] that all of the partners must approve if the limited partnership statute does not include merger provisions, even if unanimity would not be required by the limited partnership agreement or statute.[116] It follows that a merger may have been validly approved under limited partnership law but not under general partnership law.

RUPA prescribes the effects of conversions[117] and mergers.[118] For exam-

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109. For discussion of similar issues regarding the application of general partner provisions on dissolution, *see supra* part II.B.8.

110. RUPA §§ 902-04, 6 U.L.A. at 344 (Supp. 1995).

111. *Id.* §§ 905-07, 6 U.L.A. at 347 (Supp. 1995).

112. Note that the confusion created by these provisions probably would exist even without overall linkage between general and limited partnerships because courts still would have to decide whether the merger provisions in the general partnership statute that explicitly apply to limited partnerships would modify an existing limited partnership statute.

113. RUPA § 902(c), 6 U.L.A. at 345 (Supp. 1995).

114. *Id.* § 902(e), 6 U.L.A. at 345. It is not clear whether this subsection provides for a different standard of liability than that provided under the purported partner provision, *id.* § 308, 6 U.L.A. at 308, and, if so, whether the conversion provision would supersede the purported partner provision in conversion situations.

115. *Id.* § 905(b), 6 U.L.A. at 347.

116. *Id.* § 905(c), 6 U.L.A. at 347.

117. *Id.* § 904, 6 U.L.A. at 346.

ple, a partner of a party to the merger who does not become a partner of the surviving entity has the rights of a dissociated partner under RUPA.[119] However, under a limited partnership statute that does not include merger or conversion provisions, the merger or conversion may be deemed to have the effect of a dissolution on the partners' rights.

C. Alternative Approaches to Linkage

Linking the general and limited partnership statutes introduces so much confusion into the law of limited partnership that linkage would have to be fixed, even if it made theoretical sense, by more carefully defining when general partnership law should apply. The next part of this article considers the more radical alternative of discarding the whole idea of linkage and redrafting the limited partnership statute on a stand-alone basis. While the extensive change inherent in delinking the statutes would involve potential costs, the poor fit between general and limited partnership law justifies these costs.

III

COSTS AND BENEFITS OF LINKAGE

Resolving linkage issues requires balancing the benefits of linkage against its costs. As described below, benefits of linkage include simplified drafting of statutes, increased availability of judicial precedents, and greater tax and regulatory benefits for limited partnerships. Costs of linkage include increased information costs, decreased coherence of terms, and uncertain gap-filling by courts.

A. Benefits of Linkage

1. *Simplified Drafting of Statues.* Linking standard forms economizes on drafting by eliminating the need to draft provisions on all issues. However, linkage still requires drafters to incur the cost of deciding which provisions should be linked. Moreover, state legislators can economize on drafting without linkage by borrowing provisions from uniform or model act proposals.[120]

2. *Increased Availability of Judicial Precedents.* Statutory standard business forms generate customs, practices,[121] and judicial precedents that increase the clarity of contract terms by reducing errors of ambiguity, inconsistency, and incompleteness. The value of these benefits depends on the size of the current stock of precedents and other materials, as well as "network

118. *Id.* § 906, 6 U.L.A. at 348.
119. *Id.* § 906(e), 6 U.L.A. at 348.
120. *See* Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and LLCs*, 66 U. COLO. L. REV. (forthcoming 1995) (discussing functions of legislative proposals by promulgators of uniform and model laws).
121. These include standard form agreements that are developed by law firms, bar groups, and treatise writers for use under particular statutes.

benefits" that will accrue in the future as a result of more people using the standard form.[122] These are important advantages of statutory standard forms over less widely used private forms.[123]

Linking limited partnerships with general partnership law increases these benefits of statutory terms by providing limited partnerships with a set of core terms that are interpreted in the large number of cases involving general partnerships. In other words, linkage produces a larger set of materials and therefore more network benefits. For example, a separate limited partnership statutory provision dealing with the fiduciary duties of general and limited partners would generate cases only in disputes involving limited partnerships. On the other hand, if the limited partnership statute were linked to the general partnership provision, courts could apply cases involving both general and limited partnership law to limited partnerships. These cases presumably would cover a wider variety of fact situations and provide more decisions for each set of facts. Although even without linkage such precedents might be available by analogy, linking limited and general partnership statutes increases the predictive power of precedents.

The benefits of linkage depend, then, on the value of the additional interpretive materials that the linkage provides. The benefits depend partly on the relative newness of the form. This suggests that linkage benefits may have been greater for limited partnerships in their early history than they are now. The benefits also depend on the need for clarity the materials provide. The benefits may be small for narrow, specific rules, such as name and registration requirements, which typically require little interpretation. Interpretive benefits may be greater for more open-ended rules, such as those concerning fiduciary duties. But this latter class of rules often involves case-by-case application in idiosyncratic fact situations where precedents may have less value. Thus, interpretive benefits of linkage may be valuable only for a relatively small category of cases.

3. *Greater Tax and Regulatory Benefits.* The history of limited partnership statutes indicates that linkage with general partnership is due partly to regulatory and tax considerations rather than to contracting costs. The first limited partnership statutes in this country[124] were adopted at a time when partnership rules held anyone with an interest in the profits of a business liable

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122. For a general discussion of network benefits, see Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 AM. ECON. REV. 424 (1985). This concept was applied to business association statutes in Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757(1995). I am indebted to Michael Klausner for this distinction between the value of a network and that of an existing stock of interpretive materials.

123. *See* Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 70 WASH. U. L.Q. 369 (1995).

124. These were modeled on the New York law, adopted in 1822. *See* ULPA § 1 cmt., 6 U.L.A. at 563.

for its debts.[125] The limited partnership was created as a narrow exception to the general rule that one could obtain limited liability only by obtaining a state-conferred right to incorporate.[126] Linking limited liability to the widely accepted partnership form reduced the suspicion with which lawmakers regarded the limited partnership.

Even after corporate limited liability became readily obtainable, linking limited and general partnerships remained expedient because of tax laws.[127] Tax laws have long distinguished between partnership "aggregates" and corporate "entities," imposing extra burdens on the corporate form.[128] Classifying a business as a partnership or corporation determines whether it is taxed on a "flow-through" basis—with income and losses attributed to partners' tax liabilities[129]—or is instead treated as a separate taxpaying entity. A firm is taxed as a partnership under Subchapter K of the Internal Revenue Code if it is not a "corporation," a term defined to include "association."[130] Whether a firm is an "association" depends on its "resemblance" to a corporation.[131] The regulations provide that a business organization is a corporation if it more closely resembles a corporation than a partnership based on several factors: continuity of life, centralized management, limited liability, and free transferability of interests.[132] In characterizing limited partnerships as partnerships rather than corporations for tax purposes, the regulations emphasize their "partnership" features, including personal liability of the general partners and management by owners.[133]

More recently, it has become possible to obtain limited liability and partnership tax treatment through the LLC[134] and the LLP.[135] These business forms include the regulatory and tax advantages formerly unique to the limited partnership form. In fact, the limited partnership form now may be a liability for some regulatory purposes because it lacks the important partnership attribute of decentralized management. In particular, limited partnership

125. *See* Waugh v. Carver, 2 H. Bl. 235, 126 Eng. Rep. 525 (C.P. 1793).

126. *Cf.* J. WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 26 (1970) (noting that "tradition assigns as a prime . . . inducement to use of the corporation the limited liability of shareholders").

127. For a general discussion and critique of the influence of tax law on business form, see Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U. L. Q. 417 (1992).

128. For criticism of the distinction between corporations and partnerships in the tax law, see *id.* at 451-56.

129. *See* I.R.C. § 701 (1988 & Supp. V 1993) (stating partnerships not subject to taxes; partners liable for taxes in individual capacities).

130. *See id.* § 7701(a)(2)-(3) (defining "partnership" and "corporation").

131. Morrissey v. Comm'r, 296 U.S. 344, 357 (1935).

132. *See* Treas. Reg. §§ 301.7701-02(a) (as amended in 1995). For leading cases interpreting these regulations, see Zuckman v. United States, 524 F.2d 729 (Ct. Cl. 1975); Larson v. Comm'r, 66 T.C. 159 (1976).

133. *See* Rev. Proc. 89-12, 1989-1 C.B. 798.

134. *See infra* part V.B.

135. *See infra* part V.A.

interests are more likely than LLC interests to be regulated under the securities laws.[136]

B. Costs of Linkage

A significant cost of linking general and limited partnership law is that linkage creates much confusion and uncertainty regarding which rules apply to certain matters. These costs could be reduced by more clearly delineating when general partnership rules apply to limited partnerships. However, such clarification may eliminate some of the benefits of linkage by increasing drafting costs and by making the overall linkage between general and limited partnership too narrow to justify treating the two forms similarly for regulatory and tax purposes. Moreover, even if linkage were adequately clarified, certain inherent costs of linkage would remain. In general, linkage interferes with basic functions of statutory standard forms, including informing the parties what rules apply, and providing coherent sets of rules and guiding courts in filling gaps.[137]

1. *Increased Information Costs.* Statutory standard forms provide firms with clear sets of ground rules. Even the clearest linkage rules increase a party's costs by forcing the party to check two or more statutes.

2. *Decreased Coherence of Terms.* The value of standard forms depends on whether they offer efficient default structures that minimize the need for customized selection of terms. If most firms that adopt term "A" would want to adopt term "B," the statutes should provide this combination rather than forcing firms to write customized contracts. In other words, the statute should be "coherent" in the sense that it offers *combinations* of terms that suit the needs of most of the firms likely to select the standard form. Constructing a coherent set of default terms involves trade-offs at the margin. For example, it is inefficient to combine two or more costly monitoring devices where the marginal cost of each additional device exceeds its marginal benefit.

Combining limited and general partnership terms may violate the coherence objective because terms that suit a business form with centralized management in which only the managers are personally liable may differ from terms that are appropriate for decentralized-management firms in which all members are personally liable. For example, managers arguably should be subject to stricter fiduciary constraints on self-dealing and negligence in centralized-management firms than in firms in which all members participate directly in management and therefore supervise their co-owners. Fiduciary duties provide post hoc monitoring through litigation, which can be excessively costly if the members

136. *See* Larry E. Ribstein, *Form and Substance in the Definition of a "Security": The Case of Limited Liability Companies*, 51 WASH. & LEE L. REV. 807 (1994) (arguing that LLC interests should not be characterized as securities).

137. For a more extended analysis of the function of the statutory standard forms on which much of the discussion in this section is based, see Ribstein, *supra* note 123.

also are monitoring contemporaneously through their involvement in management. Linkage nevertheless encourages courts to apply the fiduciary duties to general partners in both types of partnerships.

3. *Uncertain Gap-Filling by Courts.* Embodying a business form in a separate statute guides a court in deciding cases for which neither a statute nor a firm's customized contract clearly provides. For example, by choosing to form a "partnership," a firm signals that in the absence of contrary agreement, all members participate equally in management. Accordingly, in a firm that adopts the partnership form but agrees to "corporate-type" centralized management by a managing partner, the manager has only such power to override the members as the agreement expressly provides. Conversely, the manager of a firm that adopts the corporate form but agrees to "partnership-type" decentralized management has a default power to manage that must be explicitly overridden by the agreement. In this way, identically drafted agreements may mean different things in different organizational forms.

Linkage may interfere with the gap-filling functions of standard forms by creating uncertainty as to whether ambiguous terms in partnership agreements should be interpreted consistently with the general partnership model of decentralized management and member liability, or with the limited partnership model of centralized management and limited liability of nonmanagers. Uncertainties about how to fill gaps in statutes may cause interpretation problems that offset any interpretive benefits that linkage provides by enlarging the scope of available case law.

4. *Application to Limited Partnerships.* Because of the regulatory and tax origins of the limited partnership,[138] it has only recently been possible to develop a clear and testable theory of the transaction costs of the limited partnership standard form. I have previously discussed how limited partnerships are usefully differentiated both from general partnerships (the limited liability of the limited partners) and from corporations (the personal liability of the general partners).[139] While each of these features offers potential advantages for some types of firms, there remains the question why a firm would want to combine limited and personal liability rather than form either a general partnership or a corporation. My earlier article focused on how the general partners' personal liability helps align them with creditors' interests, thereby mitigating the agency costs of debt inherent in limited liability.[140]

The general partners' personal liability does not, however, fully explain the limited partnership "control rule," which makes limited partners liable as general partners for taking part in the control of the business.[141] This rule

138. *See supra* part III.A.3.
139. *See* Ribstein, *supra* note 5, at 841-63.
140. *Id.* at 847-48.
141. *See* ULPA § 7, 6 U.L.A. at 582; RULPA § 303, 6 U.L.A. at 505 (Supp. 1995).

does not ensure that management powers are exercised only by those who are personally liable for the firm's debts, since the rule does not prevent anyone but the limited partners from exercising control.[142] Instead, the control rule operates to prevent owners from exercising the usual power of residual claimants to take over management responsibilities.

Enforced owner passivity serves two purposes. First, it protects creditors by assuring them that limited-liability owners in insolvent firms will not initiate or approve transactions by removing general partners, by amending the agreement, or in collusion with insolvent or thinly capitalized general partners. Such actions would likely be contrary to the creditors' interests because the limited partners can gain from gambles that pay off while having nothing to lose from those that do not.[143] The control rule ensures that those who exercise control have incentives to consider creditors' interests. In some contexts, this rule will work better than both turning control over to creditors, which could create perverse incentives vis-à-vis residual claimants, or simply leaving it to managers to balance incompatible creditor and owner interests.[144]

Second, the control rule protects general partners. By prohibiting limited partners from ousting a general partner as the firm approaches insolvency, the rule assures general partners that they will not be exposed involuntarily to burdensome personal liability. Also, the control rule allows the limited partnership form to be used to effectuate an "estate freeze" in which an owner-manager of a family-controlled business can retain control while distributing financial interests in the firm to family members.[145]

This analysis suggests that there is a transaction cost justification for limited partnerships as a business form separate from general partnerships. This explanation could be tested empirically by determining what types of firms are organized as limited partnerships after the rise of both the LLC and the LLP has eliminated the initial tax and regulatory reasons for adopting the limited partnership form.

Because the enforced passivity of limited partners is a distinguishing characteristic of limited partnerships, it should be taken into account when drafting other provisions of the limited partnership statute. In other words, the statute is coherent only if all of its provisions suit a firm whose nonmanaging

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142. *See* Ribstein, *supra* note 5, at 885.

143. For a good illustration of this problem, see Chancellor Allen's opinion in Credit Lyonnais Bank Nederland v. Pathe Communications Corp. (Del. Ch.1991), *reprinted in* 17 DEL J. CORP. L. 1099, 1154-57 (1992).

144. The problems of these alternatives in the corporate context are illustrated by Credit Lyonnais Bank Nederland v. Pathe Communications Corp., in which the board was held not to have breached its duty to the shareholder by refusing to sell assets. *See id.* For a criticism of this decision, see C. Robert Morris, *Directors' Duties in Nearly Insolvent Corporations: A Comment on* Credit Lyonnais, 19 J. CORP. L. 61, 67 (1993) (noting that fiduciary principles do not work well in this instance because of the difficulty of balancing conflicting interests).

145. *See* S. Stacy Eastland, *Valuation Planning With Respect To Transfers Of Partnership Interests Under Chapter 14; Transfer Tax Consequences Of Selected Partnership Structures*, 1 ALI-ABA COURSE OF STUDY: PLANNING TECHNIQUES FOR LARGE ESTATE 109, 172-75 (1993).

members have contracted for enforced passivity. Moreover, the statute should signal courts to fill gaps in contracts and in the statute consistently with this principle of enforced passive ownership. Conversely, general partnership provisions that are designed for coequal and active owners are not well suited for limited partnerships and should be delinked from limited partnership law.

C. Summary

The foregoing analysis suggests that linking general and limited partnerships has some benefits, such as increasing the stock of legal precedents that can be used to interpret limited partnership terms and tying limited and general partnerships together for tax and regulatory purposes. The benefits of additional case law, however, are unclear because many statutory terms are specific enough to need little interpretation, and courts often face idiosyncratic facts. The regulatory and tax benefits of linking general and limited partnerships also may be small in light of parties' ability to obtain these benefits by forming LLCs or LLPs. Thus, the benefits of linkage are outweighed by the costs of inappropriately combining two disparate standard forms: incoherence; increased information costs; and erroneous gap-filling.

It follows that limited partnership statutes should be revised to stand alone rather than to incorporate terms of the general partnership statute.[146] Thus, the rest of this article will provide specific guidance as to how delinkage could be accomplished.

IV

A GUIDE TO DELINKING LIMITED PARTNERSHIPS

This part analyzes issues raised by delinking the limited and general partnership statutes, as recommended in part III, and makes specific suggestions for drafting a delinked limited partnership statute.

A. Formalities of Organization and Purported Partners

Formalities in limited and general partnerships differ significantly. The limited partnership certificate discloses to third parties the nature of the business form and the identity of personally liable managers.[147] Because general partnerships have nothing comparable to a limited partnership certificate,[148] the two types of firms should differ regarding the role of nonrecord representa-

146. Although delinkage would be efficient, changing the law by delinking the statutes might impose significant costs on existing businesses by retroactively changing the default terms of parties' contracts. Accordingly, delinkage should not apply to existing limited partnerships unless the partnerships have agreed to apply the new law. In any event, retroactive changes of corporate contracts may be unconstitutional. *See generally* Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767 (1989) (arguing that the Constitution's contract clause mandates minimal state intrusion in corporate contracts).

147. *See* Ribstein, *supra* note 5, at 877-80.

148. This is changing with the advent of the LLP. *See infra* part V.A.

tions of partnership. In order to reduce investigation and litigation costs, a person whom the certificate lists as a general partner should be liable as such even if that person has not been represented as a general partner apart from the certificate. Conversely, a third party who is on notice that she is dealing with a limited partnership should not be able to recover partnership debts from a person who was not listed as a general partner in the certificate, irrespective of noncertificate representations. In short, the delinked limited partnership statute should not apply the general-partnership purported-partner rule since it would lead to different results.[149]

In order to avoid possible conflicts between recorded documents, the limited partnership certificate should be the sole repository of record information about the partnership, including statements concerning the authority and status of the general partners. Accordingly, separate statements of authority and dissociation provided for under RUPA[150] should not apply to limited partnerships. For example, a person who continues to be listed in a limited partnership certificate as a general partner should continue to have the status of a general partner as to third parties even if she has dissociated and a RUPA "statement of dissociation" has been filed.[151]

B. Partners' Management Power

Because limited partners' passivity is a critical feature of the limited partnership form, partner management power is probably the most important linkage issue. Given the passivity of limited partners, third parties would expect general partners to have greater power to manage a limited partnership vis-à-vis the limited partners than has each general partner vis-à-vis her co-partners in a general partnership. A general partner therefore should be able to take all but the most extraordinary actions on behalf of a partnership without limited partner approval. Indeed, limited partnership cases tend to restrict a general partner's power to bind the firm mainly when a third party has specific reason to know that a general partner's act was unauthorized.[152] Accordingly, limited partnership statutes should be revised to eliminate potential confusion from

149. *See* Ribstein, *supra* note 5, at 878 n.153.

150. *See supra* part II.B.1.

151. *See* RUPA § 704, 6 U.L.A. at 333 (Supp. 1995). There is some question whether either a certificate disclosure or a statement of dissociation should bind a third party regarding a partner's dissociation since this would require third parties continually to check the record. *See* Ribstein, *supra* note 5, at 878 (discussing certificate disclosure); Ribstein, *supra* note 59, at 48 (discussing statement of dissociation).

152. *See In re* Fox Hill Office Investors, 926 F.2d 752 (8th Cir. 1991) (holding that limited partnership was not bound by loan because partner's broad authority was limited by restrictions regarding recourse loans and commingling); Anchor Centre Partners v. Mercantile Bank, 803 S.W.2d 23 (Mo. 1991) (holding that limited partnerships not bound by loan where creditor knew from the partnership agreement that the partners' consent was required for an assignment of assets as security for nonpartnership debt); Green River Assocs. v. Mark Twain Kansas City Bank, 808 S.W.2d 894 (Mo. App. 1991) (holding that since bank knew partnership agreement required deposit of proceeds of loan in partnership account, it could not rely on apparent authority of general partner to deposit proceeds elsewhere, so partnership was not liable for repayment of misappropriated proceeds).

linkage by clarifying which acts of a general partner require limited partner consent.[153]

C. Transferability

Both limited and general partnership statutes restrict the transfer of management rights.[154] This suggests that general partnership precedents on this point should apply to limited partnerships. Yet applying general partnership precedents to transfers by limited partners seems inappropriate at first blush because limited partners' passivity both increases their need for an exit option and decreases their need to veto new limited partners.[155] Accordingly, the restrictions appear intended only to prevent the firm from having the corporate tax feature of free transferability.

On the other hand, there may be a nontax justification for a default rule restricting transferability of limited partners' management rights. Such a rule provides an alternative both to corporations, which provide for free transferability of passive interests, and to partnerships and LLCs, which restrict transferability for active owners. In particular, restricting transferability of limited partners' management rights accommodates the use of limited partnerships as devices for locking in control and membership in family firms.[156]

The delinked limited partnership should therefore provide for restricted transferability of limited partner management rights. Although the parties could agree to restrict transferability under a default rule of free transferability, creating a default rule against transferability signals that ambiguities in agreements should be interpreted consistently with a standard form of restricted transferability.

D. Partners' Financial Rights and Duties

The general partnership rule of equal sharing of financial rights should not apply to limited partnerships.[157] Given the different roles of and risks to general and limited partners, the two classes of interests should not share equally. Furthermore, the two classes should not be treated the same under a limited partnership default rule of sharing according to contributions.[158] In the unlikely situation that there is no express agreement, the parties probably would expect the general partners to receive something in return for their contributions of management and credit. Yet a default rule of equal sharing among general partners and sharing by contributions among limited partners leaves unclear the total shares of each class of partners.

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153. A good starting place is the list of general partner acts that require limited partner consent, except for the outmoded reference to confessions of judgment. *See e.g.* ULPA § 9, 6 U.L.A. at 586.

154. *See supra* part II.B.5.

155. *See* Ribstein, *supra* note 5, at 892-93.

156. *See supra* text accompanying note 145.

157. *See supra* part II.B.6.

158. See RULPA § 503, 6 U.L.A. at 549 (Supp. 1995).

The best solution may be for the statute to provide by default, on the one hand, for aggregate financial rights equally split between general partners and limited partners, and, on the other hand, for per capita and pro rata sharing rules, respectively, within each of these classes. Although this rule may be unsuitable for many partnerships, it remains a better default rule than one that does not distinguish between general and limited partnership interests.

E. Fiduciary Duties and Remedies

General partnership fiduciary duties are inappropriate in limited partnerships. Because of limited partners' enforced passivity and the conflicts inherent in the differing interests of limited liability and personally liable members, limited partnerships have a greater need for rules restricting self-interested conduct by managers. Accordingly, applying the same level of stringent fiduciary duties in the two contexts violates the coherence objective of statutory standard forms.[159] Despite the current rules linking general and limited partnerships, the courts now characterize general partners in limited partnerships for fiduciary duty purposes more as corporate directors than as partners.[160]

Linkage also creates problems regarding limited partners' duties. General partners' fiduciary duties clearly should not apply to limited partners, given the latters' enforced passivity. But limited partners arguably should have a duty not to abuse their limited veto power by selfishly acting contrary to the general partners' interests. For example, limited partners of financially strapped firms could block asset sales that would forestall bankruptcy and, in turn, a large personal liability for the general partners, preferring instead to "roll the dice" given their own limited stakes in the firm.[161] On the other hand, since limited partners have no managerial responsibilities, perhaps limited partners should be no more subject to default fiduciary duties than are ordinary creditors.[162] The parties could protect against opportunistic use of the limited partners' veto power by specific contractual provisions.

With respect to remedies, UPA accounting should not be the exclusive remedy in limited partnerships. This remedy may be appropriate to deal with

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159. Indeed, fiduciary duties in the traditional sense of constraints on managers may be inappropriate in general partnerships. *See* Ribstein, *supra* note 59, at 54.

160. *See* Wyler v. Feuer, 149 Cal. Rptr. 626 (Cal. Ct. App. 1979); Trustees of Gen. Elec. Pension Trust v. Levenson, 18 DEL J. CORP. L. 364, 370-71 (Del. Ch. 1992). The corporate director analogy also is suspect. Fiduciary duties may be less necessary in limited partnerships than in corporations to constrain managers' actions that are careless or not strongly self-benefitting because general partners are motivated to act in the firm's interests by their ownership interests and (at least where the partner is an individual) their personal liability.

161. *See* KE Property Management, Inc. v. 275 Madison Management Corp., 19 DEL. J. CORP. L. 364, 370-71 (Del. Ch. 1993) (holding that in exercising power to remove general partner, limited partner resisting bankruptcy may have had duty not to act to detriment of general partner and other partners, but finding that removal for fraud was permitted by partnership agreement).

162. *See, e.g.*, Kham & Nate's Shoes No. 2 v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990) (holding that lender had no fiduciary duty to borrower).

the complex litigation that can arise out of cross-claims between partners.[163] But this complexity is less likely to be a problem in limited partnerships, which typically have only one or two general partners, and the limited partners of which are unlikely to have contribution obligations that give rise to cross-claims.

F. General Partner Dissociation and Dissolution

General partnership law regarding general partner dissociation and dissolution should not be applied to limited partnerships because of the many relevant differences between the two forms of business. With regard to dissociation, general partner exit should be restricted more in limited than in general partnerships. Although general partners' exposure to liability justifies giving them a default exit right in both types of firms, the costs to the partnership stemming from general partner withdrawal are likely to be greater in a limited partnership because the limited partners necessarily rely on the general partner's managerial skills. Moreover, the potential costs to the general partner of restricting her exit are likely to be less in limited than in general partnerships because the limited partners' enforced passivity makes it less likely they will opportunistically take advantage of a frozen-in partner.[164] Accordingly, limited partnership statutes should at least provide for a default notice period prior to dissociation, and they should expressly permit agreements that wholly bar dissociation.

With respect to dissolution, given the general partner's managerial role in limited partnerships, limited partnership statutes should continue to provide for dissolution on withdrawal of a general partner,[165] at least where the partner's withdrawal occurs after the completion of an agreed term or undertaking.[166] As in RULPA, the partners should be able to provide in the agreement for continuation of the partnership and, in the absence of an agreement, to vote to continue the partnership upon the dissociation of a general partner. However, the statute should not require by default that the limited partners vote unanimously to continue the partnership. The limited partners have less need than do general partners to be able to veto the continuation of the partnership after a general partner's withdrawal. Nor are limited liability passive owners ordinarily concerned about continuing liabilities or their ability to work with new management. Moreover, the limited partnership provisions should apply to the exclusion of those in the general partnership statute, absent contrary

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163. *See* 2 BROMBERG & RIBSTEIN, *supra* note 28, § 6.08(c), at 6:100-:102.

164. The appropriate rules on dissociation may also depend on whether the general partner is incorporated. But since incorporation, however common, is not part of the standard form, there is a weaker basis for coordinating this feature with other rules that are part of the standard form. The control rule arguably serves to lock passive members out of management whether or not the general partner has personal liability.

165. *See* RULPA § 801, 6 U.L.A. at 569 (Supp. 1995).

166. This is also similar to RUPA § 801(2)(i), 6 U.L.A. at 335 (Supp. 1995), which provides for dissolution unless the partnership is continued by the vote of a majority in interest of members after the partner's dissociation from the partnership for a term.

agreement. Among other things, exclusivity would prevent a general partner from making an end-run around restrictions on withdrawal by dissolving the partnership by express will pursuant to the general partnership statute.[167]

With regard to the consequences of dissolution, there is no reason for distinguishing general partners in general partnerships from general partners in limited partnerships. The statute should, however, clarify the distinct consequences of dissolution for limited partners. For example, the profits-or-interest election,[168] which is designed specifically for general partners, should not apply to limited partners.

G. Creditors' Rights

Creditors should have the same rights against a limited partnership and its general partners as they have against a general partnership. However, the limited partnership statute should provide for these rights separately to clarify creditors' rights against limited partners. In particular, creditors of individual limited partners should be readily able to foreclose on partnership interests, because such foreclosure poses no risk to the management or continuity of the partnership.[169]

H. Merger and Conversion

Merger and conversion provisions raise potential linkage problems to the extent that they permit combinations between limited partnerships and other business entities, including general partnerships. Rules on governance, formalities, and member liability in the various corporate and partnership statutes should be coordinated.[170] For example, the general partnership statute should not prescribe a limited partnership merger vote different from the vote required for comparable actions by the limited partnership statute. Another potential linkage problem in merger and conversion concerns the limited partnership control rule. Because the control rule is intended to protect creditors from actions by owners,[171] the owners should not be able to escape these restrictions unilaterally by merging a limited partnership into a limited liability firm, such as an LLC, which is not subject to the control rule,[172] without the sort of creditor payoff that would occur in a dissolution.

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167. Nevertheless, the partners should be able to provide for other causes of dissolution in their agreement, including dissolution by express will of the partners.

168. *See* UPA § 42, 6 U.L.A. at 521.

169. *See supra* text accompanying notes 103-09.

170. *See supra* part II.B.10. One way to provide this coordination is through "cross-entity" merger provisions such as those recently adopted in Kansas. *See* 1995 Kan. Sess. Laws 336, enacted May 7, 1995.

171. *See supra* text accompanying note 144.

172. The same principle applies to merger with limited partnerships formed under the Georgia statute, which does not include the control rule. *See* GA. CODE ANN. § 14-9-303 (1994). However, this problem does not apply to combinations with general partnerships, in which members have personal liability whether or not they participate in control.

V

OTHER APPLICATIONS OF LINKAGE

This part looks broadly at other linkages in business association statutes. The analysis distinguishes three variations on linkage between general and limited partnerships. Part A discusses the explicit linkage of general partnerships and LLPs. Part B discusses implicit linkage that results from using language from one type of business association statute in a statute that applies to another type of business association. Part C discusses implicit delinkage, where a nonstandard type of firm such as a close corporation or centrally managed partnership may be treated differently from a standard firm organized under the same statute. Although these variations on linkage involve basic policy considerations similar to those applying to limited partnerships, they raise somewhat different issues because of differences in the specificity and appropriateness of linkage.

A. Explicit Linkage: General Partnerships and LLPs

LLP provisions are terms of the general partnership statute that allow partners to limit their liability, generally for co-partner negligence only, provided that they comply with requirements regarding insurance, name, and central filing.[173]

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173. LLP statutes included the following as of the early summer of 1995: S.B. 1012, 41st Leg., 2d Sess., 1994 Ariz. Legis. Serv. 566 (West), *available in* Westlaw, AZ-LEGIS94 File; S.S.B. 360, 1994 Leg., Feb. Sess., 1994 Conn. Legis. Serv. 859 (West), *available in* Westlaw, CT-LEGIS94 File; S.B. 161, 137th Gen. Assembly, 1993-94 Sess., 1993 Del. Laws, *available in* Westlaw, DE-LEGIS93 File; Act. 10-66, 1993-94 Council Sess., 1993 D.C. Reg. 5764, *available in* Westlaw, DC-LEGIS93 File; H.B. 199, 1995 Ga. Laws, *available in* Westlaw, GA-LEGIS File; S.B. 1448, 88th Gen. Assembly, 1993-94 Sess., 1994 Ill. Legis. Serv. 1454 (West), *available in* LEXIS, STATES Library, ILTEXT File; H.F. 2280, 75th Gen. Assembly, 2d Sess., 194 Iowa Legis Serv. 1454 (West), *available in* Westlaw, IA-LEGIS94 File; S.B. 582, 75th Leg., 1993-94 Sess., 1994 Kan. Sess. Laws, *available in* LEXIS, STATES Library, KSTEXT File; S.B. 184, 1994 Leg., Regular Sess., §§ 97-106, 1994 Ky. Acts, *available in* Westlaw, KY-LEGIS94 File; S.B. 513, 1994 Gen. Assembly, Regular Sess., 1994 Md. Laws, *available in* Westlaw, MD-LEGIS94 File; H.B. 5593, 87th Leg., 1994 Sess., *available in* LEXIS, STATES Library, MITEXT File; H.F. 1985, 78th Leg., 1994 Sess., 1994 Minn. Sess. Law Serv. (West), *available in* Westlaw, MN-LEGIS94 File; S.7511-A, A. 11317-A, 217th Leg. §§ 6-15, 1994 N.Y. Laws, *available in* Westlaw, NY-LEGIS94 File; H.B. 923, 1993 Gen. Assembly, Regular Sess. art. 3a, 1993 N.C. Adv. Legis. Serv. 499, *available in* Westlaw, NC-LEGIS93 File; S.B. 74, 120th Gen. Assembly, 1993-94 Sess., 1994 Ohio Legis. Serv. 5-165 (Baldwin), *available in* LEXIS, STATES Library, OHTEXT File; S.B. 1059, 178th Gen. Assembly, 1993-94 Sess., 1994 Pa. Legis. Serv. 523 (Purdon), *available in* LEXIS, STATES Library, PATEXT File; H.B. 4283, Gen. Assembly, Regular Sess., 1994 S.C. Acts, *available in* Westlaw, SC-LEGIS94 File; H.B. 1252, 1995 S.D. Laws, *available in* SD-LEGIS File; H.B. 273, 73d Leg., 1993 Sess., 1993 Tex. Sess. Law Serv. 3891 (Vernon), *available in* LEXIS, STATES Library, TXTEXT File; UTAH CODE ANN. §§ 48-1-41 to -48 (Supp. 1994). All of the statutes provide that a partner is liable for her own negligence and for participating in or failing adequately to monitor co-partner negligence. They all also provide that the limitation of liability does not apply to debts incurred prior to registration. A few of these statutes provide that partners have limited liability for all types of liabilities. *See* H.B. 199, 1995 Ga. Laws, *available in* Westlaw, GA-LEGIS File; MINN. STAT. ANN. § 323.14 (West 1981 & Supp. 1995); N.Y. PARTNERSHIP LAW § 26 (McKinney 1988 & Supp. 1995); H.B. 1252, 1995 S.D. Laws, *available in* SD-LEGIS File. For a complete and current discussion of LLP statutes, see ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE

LLPs are explicitly linked to other types of general partnerships in the sense that, except as specifically provided in the statutes, general partnership law applies to LLPs. The linkage with general partnership law is stronger than for limited partnerships because LLP provisions are part of the general partnership statutes and do not include separate operational provisions regarding such issues as management, transfer, dissolution, fiduciary duties, and economic rights, which apply specifically to LLPs.

Linkage in LLPs may have the advantage of helping firms adopt limited liability without having to leave behind the helpful body of partnership law and custom. This may encourage more firms to become LLPs, which, in turn, may generate still more customs and precedents. Yet linkage in the LLP context also violates the coherence and gap-filling objectives of standard forms[174] by combining limited liability with partnership default rules that are designed for personally liable owners. For example, because of their limited liability, LLP partners, unlike conventional partners, arguably should have a weaker default power to participate in management and to exit than do partners in non-LLPs. These considerations suggest that LLPs should be governed by distinct statutes designed to accommodate the combination of limited liability and partnership-type management.

Whether or not linkage in LLPs is justified, the LLP form may have transaction-cost and regulatory benefits that offset the costs of erroneous linkage. These benefits include allowing existing firms to adopt limited liability without having to incur all of the costs of converting to a completely new form of business, helping ensure that the firms remain partnerships for purposes of applying tax and regulatory statutes.[175] For these reasons, LLPs may prefer to adopt the full set of partnership features even if these features are not fully coherent with limited liability. Delinking LLPs from general partnerships might therefore deny firms a useful contract form.

REVISED UNIFORM PARTNERSHIP ACT (1995).

174. *See supra* parts III.B.2-3.

175. *See generally* Larry E. Ribstein, *Possible Futures for Unincorporated Firms*, U. CIN. L. REV. (forthcoming 1995) (reviewing transaction cost and regulatory advantages of LLPs).

TABLE 1: LLC BORROWING FROM OTHER STATUTES

Provision	No. adopting (total=48)	Description	Comparable[1]
Corporation			
Corporate Powers	31	List of powers	MBCA § 3.02
Purporting to act	17	No actions as LLC until compliance with formalities	MBCA § 2.04
Creditor post-dissolution claims	22	Procedures for paying claims	MBCA § 14.06-.07
Foreign LLC transacting business	31	List of activities that are not transacting business	MBCA § 15.01
Limited partnership			
Formation of partnership	11	Filing of certificate or substantial compliance with requirements	RULPA § 201(b)
Contribution form	45	May be in any form	RULPA § 501
Compromise of contributions	34	Compromise does not affect intervening creditor	RULPA § 502(c)
Interim distributions	43	Agreement controls time of distribution prior to withdrawal or dissolution	RULPA § 601
Distribution form	38	Restricting right to receive non-cash distribution	RULPA § 605
Membership interest definition	32	Defined as personal property, includes only financial rights, and is assignable	RULPA § 701-02
Assignee obligations	18	Assignee liable only when becomes member, then only for known obligations	RULPA § 704(b)
Assignor's status	14	Assignor no longer member after assignment of all of interest	RULPA § 702
Assignor's liabilities	41	Assignor retains liabilities	RULPA § 704(c)
Assignee's right to become member	23	On member consent or as agreed	RULPA § 704(a)
Rights of members' creditors	41	Partnership-type charging order	RULPA § 703
Estate's power	32	Estate exercises deceased or incompetent member's power	RULPA § 705
Duty to keep records	34	List of records to be kept	RULPA § 105
Partner's business transactions with partnership	8	Partner has non-partner rights when transaction business with partnership	RULPA § 107
Derivative suits	18	Provisions for derivative suits	RULPA § 1001-04
Member right to withdraw			
a. Limited partner provision	31	As agreed or on notice per statute	RULPA § 603
b. General partner provision	10	Power but not necessarily right	RULPA § 602
Dissociation events	23	List of events specified	RULPA § 402
Wrongful withdrawal penalty	19	Liable for damages	RULPA § 602
Dissolution causes	31	Events dissolving partnership	RULPA § 801
Consent to continuation after member dissociation	31	Unanimous within 90 days	RULPA § 801(3)
Distributions on dissolution	32	Order of distribution of assets	RULPA § 804
Participation in winding up	17	Exclude wrongfully dissolving managers	RULPA § 803
Foreign registration required	48	Certificate required before transacting business	RULPA § 902[2]
Internal affairs	37	Foreign law governs internal affairs and member liability of foreign LLC	RULPA § 901
Foreign LLC's failure to register	32	LLC may not defend suit, but no effect on member liability or contracts	RULPA § 907
General partnership			
Member agency power	29	Member(manager) in member(manager) -managed LLC binds in ordinary transactions	UPA § 9(1)
Duty of loyalty	9	Member must account for LLC benefits derived without co-member consent	UPA § 21(1)
Wrongful withdrawal penalty	5	Member forfeits right to goodwill	UPA § 38(2)

[1] Citations are to the Model Business Corporation Act (1991) ("MBCA"); RULPA, 6 U.L.A. at 355; UPA, 6 U.L.A. at 1.

[2] This provision is also similar to corporate-type provisions. *See, e.g.*, MBCA § 15.03.

B. Implicit Linkage: The Problem of LLCs

LLC statutes import language from the three other major business forms: general and limited partnerships and corporations.[176] The following table shows the extent to which LLC statutes have borrowed from other statutes.[177] Borrowing from these statutes implies linkages between LLCs and the forms from which language is imported. Courts could, therefore, interpret LLC provisions by applying case law from these other forms. Such linkage has some benefits for LLCs. Because LLC statutes provide for a new standard form, there are no cases dealing with the many issues that may arise under the statutes. Linking LLCs and other standard forms would provide LLC law with interpretive materials associated with the linked forms, just as does linking LLPs with general partnerships.[178] This, in turn, encourages more firms to use the LLC form. The fact that the first LLC statute, enacted in Wyoming, was drawn largely from the Wyoming corporation statute[179] indicates that legislatures recognize this advantage of linkage.

On the other hand, part III of this article demonstrated that the value of linking case law is minimal with regard to many types of both specific and general rules.[180] Moreover, linkage has the potential costs of encouraging courts to apply inappropriate rules to LLCs. Thus, even if linkage has advantages for LLCs, courts should interpret LLC statutes as independent standard forms, at least in the absence of explicit linkage language or other direct indicia of legislative intent compelling linkage.

Indeed, there are several important differences between LLCs and the forms from which LLC statutes borrow provisions that make linkage unsuitable for LLCs in light of the coherence and gap-filling objectives of statutory standard forms.[181] All LLC statutes provide for limited liability.[182] Also, while all statutes allow the LLC to be managed by managers and provide alternative default rules for manager-managed firms,[183] the vast majority provide for a

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176. LLC statutes also may include explicit linkage language. *See, e.g.*, CAL. CORP. CODE § 17153 (West Supp. 1995) (providing that manager's fiduciary duties are those of partner); 15 PA. CONS. STAT. § 8904 (Supp. 1994) (providing that "[u]nless otherwise provided in the certificate of organization, in any case not provided for in this chapter," general partnership law applies to member-managed LLCs and limited partnership law to manager-managed LLCs). These provisions raise interpretive questions similar to those discussed in part II.A concerning the explicit linkage of limited and general partnerships, including instances where an issue involves a case for which the LLC statute does not provide. The Pennsylvania statute raises additional questions about the interpretation of certificate provisions that purport to waive linkage.

177. For tables of specific state provisions in these categories, see LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES (1992 & Supp.).

178. *See supra* part III.A.2.

179. *See* William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. (forthcoming 1995).

180. *See supra* part III.A.2.

181. *See supra* part III.B.2-3.

182. *See* RIBSTEIN & KEATINGE, *supra* note 177, App. 12-1.

183. *See id.* § 8.04, at 8-9 (Supp. 1994) (discussing management of LLCs by managers).

default rule of direct management by members.[184] Thus, LLCs differ from limited partnerships in the decentralized-management default and in the limited liability for all members, from general partnerships in the alternative centralized-management default and in the limited liability of all members, and from corporations because of the decentralized-management default and in the greater informality allowed by LLC statutes. Because of these differences, linking LLCs with any of these other forms would create a problem in the coherence of the linked provisions with those of the LLC statutes.

Two examples illustrate this problem. First, as indicated in Table 1, most LLC statutes adopt the general partnership default rule that each member of a member-managed LLC and each manager of a manager-managed LLC can, like partners in a general partnership, bind the firm in the ordinary course of business. Linkage would apply the large body of partnership cases in determining members' and managers' power to bind in ordinary transactions. It follows that partnership rules would apply to issues related to the power to bind, including whether notice to, or an admission or wrongful act by, a member or manager is binding on the firm,[185] and whether an unauthorized member or manager can bind the firm.

This linkage with partnership agency rules, however, is inconsistent with the LLC dual-default rule. Most LLC statutes provide that a member has no power as such to bind an LLC that has opted out of the default member-management.[186] These statutes require an opt-out from decentralized management to be embodied either in the articles or in a written operating agreement.[187] An LLC member's power to bind the firm depends, therefore, on factors that are irrelevant in the partnership setting: whether the LLC selected a particular management form, and whether the member can be characterized as a "manager" if the firm has elected the centralized-management default. By contrast, a partnership can alter a partner's power to bind only if the partnership informs third parties.[188] It follows from these differences between LLCs and partnerships that partnership law should not necessarily apply in resolving agency issues in LLCs that are not explicitly covered by the LLC statute. For

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184. *Id.* § 8.03 (discussing management of LLC by members). The exceptions are MINN. STAT ANN. § 322B.606 (West Supp. 1995); N.D. CENT. CODE § 10-32-69 (Supp. 1993); OKLA. STAT ANN. tit. 18, § 2013 (West Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 1528n, § 2.12 (West Supp. 1995). The Minnesota and North Dakota statutes permit members to take action that otherwise must be taken by managers and permit members to enter member control agreements. *See* MINN. STAT ANN. §§ 322B.37, 322B.606(2), 322B.67 (West Supp. 1995); N.D. CENT. CODE §§ 10-32-50, 10-32-69(2) (Supp. 1993).

185. For discussions of these issues, see RIBSTEIN & KEATING, *supra* note 177, §§ 8.11-.13. A few LLC statutes provide specific rules regarding admissions by and notice to partners, in all cases by adopting rules from the UPA. *See* ALASKA STAT. §§ 10.50.255-.260 (Supp. 1994); KY. REV. STAT. ch. 275, §§ 28, 29; ME. REV. STAT. ANN. tit. 31, §§ 642-643 (West Supp. 1994); WIS. STAT. § 183.0302-.0303 (West Supp. 1994).

186. *See* RIBSTEIN & KEATING, *supra* note 177, App. 8-1 (tabulating state provisions). For a discussion of members' power to bind a centrally managed LLC, see id. § 8.09.

187. *See id.* (tabulating state provisions).

188. *See* UPA § 9, 6 U.L.A. 132 (providing that a partner's act is not binding as to an ordinary matter if the partner had no authority and the third party knew that this was the case).

example, under an LLC statute that is silent on admissions and notice, an admission by, or notice to, a nonmanaging member should not bind a manager-managed LLC as to a third party who lacks knowledge that the member lacks authority, if a general partnership would be bound in analogous circumstances.

A second example of the LLC linkage problem concerns members' power to withdraw. As Table 1 shows, several LLC statutes have adopted the limited partnership provision that gives general partners the power, but not necessarily the right, to withdraw. Applying the general partnership default suggests that in filling gaps in the statutes and agreements, the courts should assume that LLC members may exit at will.[189] Yet denying exit generally will impose less severe consequences on limited liability LLC members than on partners who need to halt their continuing liability. Accordingly, LLC members' power to withdraw should at least be subject to contrary agreement. At the same time, it is not clear that the withdrawal rule applicable to limited partners should be applied to LLC members. Unlike limited partners, LLC members participate by default in management and therefore contribute undiversifiable human capital to the firm. They therefore need a remedy against potential oppression by majority members. Accordingly, LLC members should have a default "put," even if limited partners should not have such a right. In general, therefore, the rule on withdrawal from LLCs should differ from the rules applicable to both general and limited partnerships.

Even if LLCs would gain more from the clarification provided by additional interpretive materials than they would lose from linkage, it is important to keep in mind that clarification need not be supplied by linkage. Rather, the clarity and predictability of LLC law could be increased by widespread adoption of uniform LLC statutory provisions. This would provide a nationwide set of interpretive materials without creating erroneous linkages with other standard forms.

Despite these potential advantages of uniformity, widespread adoption of the Uniform Limited Liability Company Act (the "ULLCA") recently promulgated by the National Conference of Commissioners on Uniform State Laws[190] is not an acceptable alternative to linkage. Uniform laws generally entail potential costs, including reducing desirable variations in LLC statutes and impeding the evolution toward optimally efficient laws.[191] The ULLCA itself is a good

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189. These provisions also leave unclear the enforceability of an agreement that nullifies the withdrawal power by denying compensation to or otherwise penalizing the withdrawing member. *See generally* Larry E. Ribstein, *Statutory and Planning Considerations for Withdrawal from an LLC*, 1 J. LIMITED LIABILITY COMPANIES 64 (1994) (discussing various issues concerning statutory provisions on LLC member dissociation).

190. *See* Uniform Limited Liability Company Act (1995) (copy on file with author).

191. *See* Larry E. Ribstein & Bruce H. Kobayashi, *Economic Analysis of Uniform Laws*, 25 J. LEGAL STUD. (forthcoming 1996) (showing that some uniform law proposals are inefficient and that states tend to adopt those that are efficient).

example of the potential inefficiency inherent in such laws.[192] On the other hand, LLC statutes have been evolving spontaneously in ways that fill gaps and eliminate questionable linkages between LLC and other law.[193] This evolution is evidence of a learning process that is correcting lawyers' and legislators' previously incomplete understanding of the special niche occupied by the LLC. Moreover, LLC provisions are evolving not only toward efficiency, but also toward efficient uniformity.[194] This suggests that an evolutionary process can produce any uniformity that is actually necessary to provide nationwide interpretive materials.

C. Implicit Delinkage: Close Corporations

Firms can waive many of the provisions of business association statutes and instead enter into customized arrangements. For example, corporations can contract around the default rule of management by a board of directors.[195] Similarly, large partnerships can contract around management directly by members and adopt centralized management by managing partners.[196] These arrangements raise the question whether nonstandard firms should be subject to statutory terms that do not suit their form of business, but which they did not waive. Application of statutory default terms could impose on closely held corporations or centrally managed partnerships the costs of either having to draft around inappropriate terms or being subject to the application of unsuitable terms.[197] Accordingly the courts should consider implicitly delinking nonstandard firms from the statutes under which they were formed.

Some courts have indeed implicitly delinked closely held and publicly held corporations. In *Donahue v. Rodd Electrotype Co. of New England*,[198] the court gave a minority shareholder a common law right of buyout in response to the corporation's buyout of a controlling shareholder, despite the absence of such a right in the statute. The court cited the special problems caused by illiquidity in close corporations.[199]

Delinkage is not, however, necessarily appropriate in this situation because it fails to account adequately for the parties' intent expressed by their choice of

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192. *See* Larry E. Ribstein, *A Critique of the Uniform Limited Liability Company Act*, 25 STETSON L. REV. (forthcoming 1995); see also Ribstein & Kobayashi, *supra* note 120 (discussing the uniform LLC Act as an example of the defects inherent in the uniform lawmaking process).

193. *See* Ribstein, *supra* note 123.

194. Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Uniformity*, ECON. INQUIRY (forthcoming October 1995) (showing that states have spontaneously evolved toward desirable uniformity in LLC statutes).

195. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a).

196. *See* UPA § 18, 6 U.L.A. at 213 (text before subsection (a)) (provision for management by partners not listed among non-waivable provisions in subsection (a)); RUPA § 103, 6 U.L.A. 286 (Supp. 1995) (provision for management by partners not listed among nonwaivable provisions in subsection (b)).

197. *See* Ian Ayres, *Judging Close Corporations in the Age of Statutes*, 70 WASH. U. L.Q. 365 (1992).

198. 328 N.E.2d 505 (Mass. 1975).

199. *Id.* at 514-15.

the corporate rather than the partnership form[200] and by their failure to contract for protection.[201] The argument for implicit delinkage is particularly weak for firms that elect not to form under available corporate statutory provisions that relate to firms that elect and qualify to be close corporations.[202] Thus, in *Toner v. Baltimore Envelope Co.*,[203] the court denied a common law buyout, reasoning in part that the company could have, but did not, elect to be treated as a special close corporation under the Maryland statute, which provides for a partnership-type buyout. Likewise, *Sundberg v. Lampert Lumber Co.*[204] held that a Minnesota statute permitting buyouts in defined close corporations precluded application of a common law buyout right to a corporation that did not fit the definition of a "close corporation." The *Sundberg* court reasoned in part that granting relief in this situation would nullify another section of the statute that provided for just and equitable relief for "unfairly prejudicial" conduct in all corporations. In these situations, the availability of a more suitable statutory form supports inferences about the parties' intent in failing to use the form, and therefore about how the court should fill apparent gaps in the agreement.

To be sure, the parties may have chosen the corporate form only because, prior to the advent of the LLC and the LLP, firms had no other way to combine LLP default rules with flow-through tax treatment. Thus, where the regulatory environment artificially limits the availability of statutory forms from which firms can choose, perhaps courts should supply the contract the parties could not make for themselves. However, once regulatory constraints on the development of standard forms are relaxed so that there are separate forms to suit many different types of firms, firms that select a particular form should be held to the default rules associated with that form.

Finally, special close corporation statutes may raise linkage problems similar to those in the LLP and limited partnership contexts. For example, in fact

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200. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 246-47 (1991); Charles O'Kelley, *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 NW. U. L. REV. 216 (1992).

201. *See* Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993) (denying an oppression remedy to close corporation shareholders on account of the corporation's establishment of a stock option program for key employees, reasoning in part that the shareholders could have drafted for protection).

202. These statutes fall into four general types: (1) provisions applicable only to nonpublic corporations or corporations that fit within a definition of "close corporation," which usually refers to some combination of number of shareholders, absence of a public offering or listing on a securities exchange, and use of stock transfer restrictions, *e.g.*, N.C. GEN. STAT. § 55-7-31(b) (1990); MODEL BUSINESS CORP. ACT § 7.32 (1991); (2) provisions applicable to any corporation that elects coverage, *e.g.*, MD. CODE ANN., CORPS. & ASS'NS §§ 4-101 to 4-603 (Michie Supp. 1995); TEX. BUS. CORP. ACT ANN. arts. 12.01-.54 (West Supp. 1995); (3) provisions applicable to corporations that both elect to be covered and meet a statutory definition of a "close corporation," *e.g.*, DEL CODE ANN. tit. 8 §§ 341-56 (Michie 1994); and (4) provisions that combine elements of the second and third types, i.e., that require election only, except in the case of previously incorporated firms where qualification is required as well, *see* MODEL STAT. CLOSE CORP. § 3, 4 MODEL BUSINESS CORP. ACT. ANN. CC-8 (Prentice Hall Supp. 1994).

203. 498 A.2d 642 (Md. 1985).

204. 390 N.W.2d 352 (Minn. Ct. App. 1986).

situations in which close corporation provisions do not explicitly allow a buyout or dissolution, it is unclear whether the courts should apply the partnership model that is appropriate for many closely held firms or the corporate standard form with which the close corporation provisions are associated.

VI

CONCLUSION

The current rules on linkage between general and limited partnerships are confusing in themselves and lead to more confusion in interpreting and applying the limited partnership statutes. Thus, the linkage provisions in the general and limited partnership statutes should be eliminated, and the limited partnership statute should be redrafted to stand alone, effective for partnerships formed after the date of the change. These changes could be reinforced by eliminating "partner" and "partnership" terminology in the limited partnership statute, perhaps by providing for "managers" and "members" as in the LLC statutes.

Moreover, linkage has applications beyond limited partnerships to other business forms and to other linkage mechanisms. These applications include borrowing statutory terms, as in LLC statutes, and the use of the same statute by business associations that differ in important ways, as in corporate statutes. In general, despite the superficial attraction of enlarging the set of interpretive materials available for standard forms, linkage should be applied cautiously and avoided altogether where other gap-filling mechanisms, including explicit statutory drafting, are available.